



August 20, 1999

Mr. Bill Flanary
Acting City Attorney
City of Paris
P.O. Box 9037
Paris, Texas 75461-9037

OR99-2360

Dear Mr. Flanary:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 126674.

The City of Paris received a request for various documents concerning the former city attorney. You timely assert that the requested information is protected from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. You specifically assert that the records at issue are confidential under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in section 552.101 or section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* at 525.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees); 423 at 2 (1984) (scope of public employee privacy is generally narrow). We agree that, pursuant to *Ellen*, you must withhold the identities of the victims and witnesses to the alleged harassment to protect their identities.

You also assert that sections 552.103 and 552.108 are applicable to protect this information from disclosure. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.), *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). You have not shown that section 552.103 is applicable.

You also assert that section 552.108 protects these records from disclosure. Section 552.108 is divided into subsections (a), (b), and (c). Subsection (c) provides that "basic information about an arrested person, an arrest, or a crime" is not excepted from disclosure under this section. Subsection (b) provides an exception for internal records of a law enforcement agency or prosecutor that are maintained for the agency or prosecutor's internal use in matters relating to law enforcement or prosecution. Subsection (a) is of broader scope, more generally concerning records held by a law enforcement agency or prosecutor that deal with the detection, investigation, or prosecution of crime. You do not indicate whether subsection (a) or (b) of section 552.108 is applicable to protect the records from release, but as the request appears to cover information other than the city police department's own internal records, we will address your arguments under subsection (a) of section 552.108.

Generally, a governmental body claiming an exception from disclosure under section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *Ex parte Pruitt*, 551 S.W. 2d 706 (Tex. 1977). A governmental body may show that release of information would interfere with law enforcement by affirmatively stating to this office that the information at issue pertains to an ongoing criminal investigation or pending criminal case.

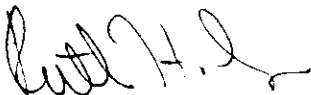
A governmental body claiming section 552.108(a)(2) should demonstrate that the requested information relates to a concluded criminal investigation that has come to some type of final

result other than a conviction or deferred adjudication. A governmental body may show the applicability of section 552.108(a)(2) by affirmatively stating to this office that the criminal investigation or prosecution has concluded, but that the conclusion was a result other than conviction or deferred adjudication.

A governmental body asserting the applicability of section 552.108(a)(3) must demonstrate either that the records at issue were prepared by the prosecutor in anticipation of or in the course of preparing for criminal litigation, or that the records at issue actually reflect the mental impressions or legal reasoning of the prosecutor. You have not demonstrated that section 552.108 is applicable to the submitted records.

The records at issue must be released except for the identities of the victims and witnesses to the alleged sexual harassment. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ruth H. Soucy', with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 126674

Encl. Submitted documents

cc: Ms. Cherie Bell
Paris News
5050 Loop 286 S.E.
Paris, Texas 75460
(w/o enclosures)